IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | | |
|---|---|---|
| craigslist, Inc.<br><br>Plaintiff,<br><br>vs.<br><br>Henry D. McMaster, in his official capacity as the Attorney General of the State of South Carolina; David Pascoe; Barbara R. Morgan; C. Kelly Jackson; Jay E. Hodge, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett, in their official capacities as South Carolina Circuit Solicitors,<br><br>Defendants. | ) | Civil Action No. 2:09-cv-01308-CWH<br><br>DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS |

## I. INTRODUCTION

The Defendants Henry D. McMaster and the sixteen Circuit Solicitors[1] submit this Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss. For the reasons set forth below and in Defendants' Memorandum in Support of Motion to Dismiss, this case should be dismissed in its entirety.

[1]J. Strom Thurmond was elected as Solicitor for the Second Judicial Circuit upon the retirement of Barbara Morgan, and William B. Rogers, Jr., was elected as Solicitor for the Fourth Judicial Circuit upon the retirement of Jay E. Hodge, Jr.

Dockets.Justia.com

## II. ARGUMENT

### A. Abstention

Seeking to circumvent the numerous decisions Defendants cite in support of abstention under Younger v. Harris, 401 U.S. 37 (1971), due to the ongoing criminal investigation, Plaintiff offers unrelated, non-substantive distinctions which trivialize these abstention decisions. Rather than offer substantive arguments against abstention, Plaintiff attempts to impugn the Attorney General's motives in opening the ongoing criminal investigation, and disparages the Attorney General's Office by suggesting the criminal investigation cited in support of abstention is nonexistent.

None of Plaintiff's arguments should be given any credence in this case. First, Defendants stand behind the decisions referenced in the Memorandum in Support, which conclude that a pending criminal investigation mandates Younger abstention. For example, while Defendants certainly recognize Cameron v. Johnson, 390 U.S. 611 (1968), was decided prior to Younger, Plaintiff completely misses the point. Cameron, cited with approval by the Supreme Court in Younger, is a persuasive earlier recognition by the Supreme Court that Younger type abstention – the longstanding doctrine that a federal court of equity will not interfere with ongoing criminal proceedings – is the rule rather than the exception. As established by the cases cited in the Memorandum in Support, that rule is applicable to criminal investigations that are part and parcel of criminal prosecution.

Plaintiff also seeks to avoid (significantly, by way of footnote) North v. Walsh, 656 F.Supp. 414 (D.D.C. 1987), which stands four square for the same principle articulated in Younger and Cameron. The fact that North involved a **federal** investigation is irrelevant. For purposes of this case, the important point to be taken from North is that the age old equitable jurisprudence doctrine of courts' non-interference with criminal proceedings mandates a federal court refrain from intruding on an **ongoing criminal investigation**. *See* Cameron, 390 U.S. at 618 ("a federal district court should be slow to act 'where its powers are invoked to interfere by injunction with **threatened criminal prosecutions in a state court**.'") (emphasis added). Relating to the Younger principle, the North court stated:

> [t]he strong policy against intervening in **ongoing criminal investigations** also persuades the court to refrain from reviewing plaintiff's substantive claim. Courts have almost never found that an **ongoing criminal investigation** imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment. The standard for obtaining any form of injunctive relief is high, Younger v. Harris, 401 U.S. 37, 46, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), but a party who seeks to enjoin **a criminal investigation** has a particularly heavy burden.

656 F.Supp. at 420 (emphasis added).

Other cases Plaintiff hopes to bypass also favor Younger abstention in the instant case because they all point in a single direction: except in the most extraordinary circumstances, a federal court will not interfere in any ongoing state criminal investigation. *See* Fieger v. Cox, 524 F.3d 770, 775 (6th Cir. 2008) ("First and most importantly, there was an 'ongoing judicial proceeding' at the time of the district court's review, namely **a criminal investigation** with the same parties, involving the same underlying circumstances.") (emphasis added); Amanatullah v. Colo. Bd. of Med. Examiners, 187 F.3d 1160, 1163-64 (10th Cir. 1999) ("[S]tate proceedings began when the Colorado Board issued its first '30 day' letter to Amanatullah advising him of its **investigation** into the allegations of the Nevada complaint. The state proceedings did not begin when the formal complaint was filed by the attorney general, as contended by Amanatullah.") (emphasis added); Seligman v. Spitzer, 2007 WL 2822208 (S.D.N.Y 2007) (under Younger, federal court may not interfere with Attorney General's **ongoing criminal investigation**); Nick v. Abrams, 717 F.Supp. 1053 (S.D.N.Y. 1989) (same). That rule should control here as well.

Plaintiff's attempt to distinguish this case from cases involving a grand jury or other investigative mechanism where subpoenas or other investigative processes were served before the federal complaint was filed, is likewise unavailing. *See* Tax Assn. of Bus. v. Earle, 388 F.3d 515 (5th Cir. 2004) (grand jury investigation); Potomac Electric Power Co. v. Sachs, 802 F.2d 1527 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 1022 (1988) (ongoing grand jury investigation entitled to Younger abstention); Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir. 1981) (issuance of a prosecutor's subpoena is a pending state proceeding for purposes of Younger abstention). In a clear effort to derail the State's criminal investigation in this case before the machinery of a formal investigation could begin, Plaintiff sought refuge in the federal courthouse in the pre-dawn hours mere days after the Attorney General initiated the formal criminal investigation.

Moreover, as the Tenth Circuit made clear in Amanatullah, an ongoing criminal investigation need not reach its penultimate climax before Younger abstention applies. In that case, the Court concluded an investigation was a pending proceeding for Younger purposes, even though the investigation had proceeded no further than gathering records from another state and sending a letter to the alleged violator requesting further explanation. 187 F.3d at 1162-1164.

Plaintiff's arguments seeking to avoid Younger abstention on the ground the criminal investigation is essentially non-existent are patently inconsistent with Plaintiff's own conduct. Initially, Plaintiff disparages the Attorney General's criminal investigation, complaining that "for all the Defendants have revealed, this 'formal' investigation may amount to nothing more than Mr. McMaster's public issuance of his May 15 letter." Plaintiff's Memorandum at 13. Plaintiff further argues much of the case law Defendants cite involved situations where prosecution was certain, near certain or imminent, in contrast to "McMaster's announcement of a 'formal' investigation into craigslist [which] clearly was not part of a judicial proceeding." *Id.* at 13-14. .

The Attorney General's Office was obviously already investigating Plaintiff's conduct when it sent the May 5 warning letter, and the monitoring associated with that investigation continued until the May 15 deadline set by the Attorney General. A mere five days (including a weekend) passed between the Attorney General's May 15 announcement of the formal criminal investigation, and Plaintiff's initiation of this action in the pre-dawn hours of May 20.

In the face of its contention the investigation was non-existent, however, Plaintiff argues it commenced this action because it faced the "untenable choice" of shutting down portions of its business or "putting itself and its management at risk of **imminent** criminal prosecution" Plaintiff's Memorandum at 2. *See also* Complaint, ¶8 (emphasis added). By seeking refuge in this Court so quickly after the Attorney General initiated the formal criminal investigation, Plaintiff clearly believed the investigation was well underway, prosecution was imminent, and sought to derail the state proceeding by filing this action.[2]

Accordingly, the decisions cited by Defendants relating to the applicability of Younger to criminal investigations should control here. As the Supreme Court noted in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992), the Younger doctrine "imposes heightened requirements for an injunction to restrain...an about-to-be pending state criminal action." *See also* Mirka United, Inc. v. Cuomo, 2007 WL 4225487 (S.D.N.Y. 2007) ("Numerous courts have held that **investigatory** proceedings that occur pre-indictment and that are an integral part of a state criminal prosecution may constitute 'ongoing state proceedings' for Younger purposes.") (emphasis added).

[2] Defendants' consent to maintain the status quo regarding possible prosecutions pending resolution of this case was simply a reasonable attempt to afford this Court an opportunity to review the case after due consideration, rather than a concession that abstention did not apply.

Nor is Plaintiff entitled to separate the situation of past criminal conduct, such as was involved in Sachs, *supra*, and "the lawfulness of its ongoing conduct." Plaintiff's Memorandum at 15. For purposes of Younger abstention, there is "no merit" in distinguishing one's status as a "present state defendant" or a "'potential future defendant.'" Roe v. Wade, 410 U.S. 113, 126-127 (1973). In other words, where a criminal investigation is pending, the fact additional proceedings may be brought for criminal conduct committed *in futuro* is irrelevant. "[A]bsent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the state is prosecuting [or as in this case, investigating] him." *Id. See also* Doran v. Salem Inn, 422 U.S. 922, 929 (1975) (If Respondent M & L had halted the alleged criminal conduct and challenged the state in federal court, it would not have subjected itself to prosecution for violation of the ordinance in state court. "[H]aving violated the ordinance, rather than awaiting the normal development of its federal lawsuit, M & L cannot now be heard to complain that its constitutional contentions are being resolved in state court.")

As the Fourth Circuit stated in Gilliam v. Foster, 75 F.3d 881, 903 (4th Cir. 1996): "[i]n Younger, the Supreme Court plainly declared that federal court equitable interference with state criminal proceedings should not be undertaken except in the most narrow and extraordinary of circumstances." Notwithstanding Plaintiff's attempt to obfuscate the issues, there are no such "narrow and extraordinary of circumstances" in this case.

Further, the Fourth Circuit has plainly rejected Plaintiff's argument that applying Younger to an ongoing criminal investigation deprives a federal plaintiff of a judicial forum. In Sachs, the Fourth Circuit stated that "[i]f indicted, PEPCO can present its claim of federal preemption by TSCA as a defense in the criminal prosecution, and therefore has an adequate opportunity to present the claim in the ongoing proceedings." 802 F.2d at 1532. See also Kaylor, 661 F.2d at 1181-1182 ("Being the object of a criminal investigation, whether rightly or wrongly, is just one of the burdens to which every citizen is exposed..."); North, 656 F.Supp. at 418-419 ("Courts have almost never found that an **ongoing criminal investigation** imposes a sufficient hardship to the person investigated to warrant judicial review prior to his or her indictment.") (emphasis added). Thus, the fact Plaintiff is the object of on ongoing criminal investigation "does not give rise to a federal claim" sufficient to warrant federal court intervention. Kaylor, 661 F.2d at 1181-1182

Defendants recognize the "federal courts have a virtually unflagging obligation to exercise their jurisdiction." Deakins v. Monaghan, 484 U.S. 193, 203 (1988). The Fourth Circuit has emphasized, however, that Younger abstention "serves as an exception to the traditional rule that federal courts should exercise jurisdiction conferred on them by statute." Martin Marietta v. Md. Comm. on Judicial Relations, 38 F.3d 1392, 1396 (4th Cir. 1994). Thus, Ex Parte Young, 209 U.S. 123 (1908) does not apply when Younger is properly invoked because federal courts should not interfere with prosecutors who "are charged with the duty of prosecuting offenders against the laws of the state and [who] must decide when and how this is to be done." Younger, 401 U.S. at 45. As the Fourth Circuit has stated,

> [t]he Supreme Court has recognized that a federal court may disregard Younger's mandate only where (1) "there is a showing of bad faith or harassment by state officials responsible for the prosecution"; (2) "the state law to be applied in the criminal proceeding is flagrantly and patently violative of express constitutional prohibitions"; or (3) "other extraordinary circumstances exist that present a threat of immediate and irreparable injury." Kugler v. Helfant, 421 U.S. 117, 124, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975) ....

Nivens v. Gilchrist, 444 F.3d 237, 241 (4th Cir. 2006).

In addition to the authorities referenced in the Memorandum in Support and herein, other decisions mandate Younger abstention when a federal suit is brought to halt on ongoing criminal or other form of investigation. *See* Rumble v. Waterhouse, ___ F.Supp.2d ___, 2006 WL 2038509 (M.D. Ga. 2006) (Younger abstention was appropriate because the "state court proceedings involve **investigations** by the Georgia Insurance Commissioner and a state prosecutor's office regarding whether individuals or entities involved in this case will be criminally charged based on the sale of the same insurance contacts in this case.") (emphasis added); Iglecia v. Serrano, 882 F.Supp. 26, 29 (D. Puerto Rico 1995) (Younger invoked in dismissing a due process violation claim arising from appointment of a special prosecutor to **investigate** whether a member of the Senate had his employees do non-legislative work; the court concluded "plaintiff shall have an opportunity to raise his federal constitutional concerns **should prosecution ensue**.") (emphasis added).

All of these authorities are powerful precedent indicating this Court should defer to the Attorney General's ongoing criminal investigation, and abstain from exercising its jurisdiction in this case. Plaintiff cannot avoid Younger's reach by simply impugning the Attorney General's investigation. Virtually every subject of an investigation cries "foul," and attempts to belittle the prosecutor. If such disparagement was the standard, it would eviscerate the Younger abstention doctrine since the party running to the federal courthouse need only claim there is no ongoing investigation even though all evidence points to the contrary. This obviously is not the law, and the Complaint should be dismissed in its entirety.

**B. The CDA**

As set forth in the Defendants' Memorandum in Support, FTC v. Accusearch, 570 F.3d 1187 (10th Cir. 2009), states " a service provider is "responsible" for the development of offensive content only if it in some way specifically **encourages** development of what is offensive about the content."

*Id.* at 1199 (emphasis added). Relying on Whitney Information Network v. Xcentric Ventures, LLC, 2008 WL 450095 (M.D. Fla. Feb. 15 2008), Plaintiff argues merely making categories available does not make it responsible for the content as an "internet content provider." Plaintiff's reliance on Whitney is misplaced.

Whitney was a **civil** action premised on claims of defamation, federal and common law trademark infringement, and false representations under federal statute. The court found Xcentric created categories, such as '"con artists', 'corrupt companies' and 'false TV advertisements,'" as well as numerous other categories from which a poster had to choose to categorize his submission on Xcentric's site, and the plaintiff failed to present any evidence the defendants participated in the selection of certain categories to describe the plaintiff. 2008 WL 450095 at *10-11. *See also* Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F.Supp.2d 929 (D.Ariz. 2008) (same).

Whitney is readily distinguishable from the instant case. Plaintiff readily admits it created the "erotic services" and "adult services" categories as a "dedicated area" for advertisements containing adult content. *See* Complaint, ¶29; Plaintiff's Memorandum at 5. These categories indeed provide an inviting beacon for such advertisements.[3] *See* Complaint, Exhibit F (craigslist is "probably the hottest way sex is being sold"). Given Plaintiff's undisputed knowledge that its "erotic services" category was being used to facilitate prostitution, merely renaming it "adult services" after the Attorney General's May 5 letter did not render Plaintiff's involvement passive. Its creation of a category that on its face encouraged, and indeed led to, advertisements for illegal conduct also created a heightened responsibility for Plaintiff to police it.[4]

---

[3] Doe IX v. MySpace, Inc., No. 4:08-CV-140, 2009 WL 1457170 (E.D. TX, May 22, 2009), does not provide any support for Plaintiff because the profile categories in that case were very general ("Interests & Personality," "Name," "Basic Info," "Background and Lifestyle," "Schools," "Companies," "Networking" ), and users were not required to provide additional content to establish an account. Similarly, the "adult services" category could not be considered a "neutral tool" under Goddard v. Google, Inc.--- F.Supp.2d ----, 2009 WL 2365866, N.D.Cal.,2009. (no civil liability for alleged fraudulent web based ads on Google.). The Google tool did "nothing more than provide options that advertisers may adopt or reject at their discretion." *Id.* at *3. In the instant case, the former "erotic services" category and its successor "adult services" category are the only likely options for advertising prostitution. Therefore, they are not merely "neutral" tools.

Moreover, Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), Whitney and related cases are **civil** liability actions, and as argued in Defendants' Memorandum in Support, while §230 does provide a broadly interpreted civil immunity for internet service providers, it does not immunize them from all criminal prosecutions. Regardless of whether Plaintiff is an information content provider, or simply a provider of an interactive computer service, nothing in §230 bars enforcement of a federal criminal statute, or any **consistent** state criminal law. Plaintiff attempts to significantly broaden the scope of §230 immunity as to state criminal laws by focusing almost exclusively on the word "any" in the second sentence of §230(e)(3).

Not surprisingly, Plaintiff glosses over the significant immunity limitation found in the first sentence of §230 (e)(3): "**Nothing** in this section shall be construed to prevent any State from **enforcing any State law that is consistent with this section**." (emphasis added). The fact this affirmative limitation on immunity is stated **first** clearly indicates it is the predominant part of this subsection. The interpretation urged by Plaintiff, however, renders the first sentence virtually meaningless by extending the immunity granted in the second sentence to **all** state laws.

Contrary to Plaintiff's argument, the statute itself expressly limits immunity from enforcement of state laws to only those laws that are "inconsistent" with §230. While the extent of

[4]Plaintiff's much touted "Terms of Use" language prohibiting advertisements for illegal activities affords it no protection when it is undisputed Plaintiff **knew** the language was being ignored and such advertisements were in fact being posted in the "erotic services" category.

the §230 civil liability is admittedly broad as judicially interpreted to date, as noted in the Defendants' Memorandum in Support, the only two cases discussing §230 immunity as to criminal prosecutions both imply **consistent** state criminal prosecutions are **not** precluded.

Plaintiff suggests the §230(e)(1) express exemption from immunity as to federal criminal statutes necessarily means immunity extends to enforcement of all state criminal statutes. Again, Plaintiff ignores that the statutory immunity from state action extends **only** to "any State or local law that is **inconsistent** [with §230]." (emphasis added). Where, as in this case, the state criminal law at issue is consistent with federal criminal statutes, §230 provides no immunity.

As discussed in the Memorandum in Support, the Mann Act declared the transportation of women in interstate or foreign commerce for immoral purposes (prostitution) to be against the national interest and illegal, and state laws prohibiting prostitution within state boundaries are consistent with the Mann Act and aid in the enforcement of Congress' prohibition of such conduct. *See* Taylor v. State, 516 P.2d 1351 (Okla.Crim.App. 1973) (state pandering law upheld as consistent with the Mann Act to the extent the state law related to conduct occurring within the state). Therefore, South Carolina's criminal law prohibiting the knowing aiding and abetting of prostitution is consistent with federal criminal law, and §230 does not immunize Plaintiff against investigation and/or prosecution under that law.[5]

---

[5]Further, as discussed below, the First Amendment of the United States Constitution does not bar prosecution for aiding and abetting prostitution, or protect other speech made for criminal purposes. *See* Pittsburgh Press Company v. Pittsburgh Comm. Human Relations, 413 US 376, 388 (1973), U.S. v. White, --- F.Supp.2d ----, 2009 WL 2244639, (N.D.Ill.,2009). Thus, it is inconceivable §230 can legitimately be construed to provide a blanket immunity from criminal investigation and prosecution for an internet service provider who encourages, or knowingly allows, use of its websites to facilitate such activities, even if it involves speech. When as here, a criminal investigation and/or possible prosecution is consistent with federal criminal law and does not transgress the First Amendment, §230 provides no immunity.

**C. First Amendment**

There is absolutely no prior restraint of speech at issue in this case. Plaintiff virtually concedes prostitution advertisements are unlawful, and not protected by the First Amendment. *See eg.,* Plaintiff's Memorandum at 29. Nor does Plaintiff contend it is at risk of prosecution for **lawful** speech on its websites, or that informal censorship activities are being undertaken. In fact, Plaintiff concedes "Defendants have an interest in policing **a small amount** of *illegal* **(and unprotected)** speech of certain craigslist users . . . [which] is, **at most, only a tiny fraction** of all the speech that takes place on craigslist's site." Plaintiff's Memorandum, p. 33 (italicized emphasis in original, bold emphasis added). Rather, Plaintiff's entire argument centers around its unsupported assertion the only way it can avoid prosecution under the Attorney General's demands would be to shut down all its South Carolina websites - an assertion that is contrary to Plaintiff's own statements.

This case is clearly distinguishable from Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). At issue in Bantam Books was a Rhode Island Commission that was limited to "informal sanctions," but had the stated goal of "suppression of publications deemed 'objectionable,'" without the "safeguards of the criminal process." 372 U.S. at 67 (emphasis added).[6] In the instant case, however, the illegality of the advertisements at issue is not in dispute, nor is any censorship

[6] As stated in Bantam Books, 372 U.S. at 69:

> The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter.

occurring outside the criminal process.

Plaintiff's reliance on Drive In Theatres, Inc. v. Huskey, 435 F. 2d 228 (4th Cir. 1970), is also misplaced. In that case, a sheriff declared **all** movies obscene other than those rated "G," and actually seized some of the allegedly offending movies. The Sheriff was restrained by court order from making seizures, but **not** from making arrests based on probable cause. Again, as in Bantam Books, the constitutionality of the material was in dispute. The illegality of prostitution advertisements appearing on Plaintiff's websites, however, is not disputed.

Both Bantam Books and Drive In Theatres involved efforts to censor a broad range of communication, the legality of which was in dispute, without going through proper adjudicative processes.[7] *See also* LSO, Ltd. v. Stroh , 205 F.3d 1146 (9th Cir., 2000) (liquor licensing). No such activities are at issue in the instant case, and again, the illegality of the advertisements targeted by the ongoing criminal investigation is not in dispute.

Smith v. People of the State of California, 361 U.S. 147 (1959), is also inapplicable. In Smith, an ordinance imposed strict criminal liability on booksellers who had even one "obscene" book in their shops. Contrary to Plaintiff's assertion it will be subjected to similar strict liability in the ongoing criminal proceeding, South Carolina law does **not** impose strict criminal liability for aiding and abetting prostitution.

As the Attorney General has stated repeatedly, Plaintiff is under investigation for **knowingly** aiding and abetting prostitution. In order to proceed with an aiding and abetting prostitution charge, the State would have to show Plaintiff knew a particular advertisement was related to prostitution, and either continued to run it, or allowed the same individual to post similar advertisements. As Plaintiff concedes, the advertisements at issue are not protected under any legal doctrine, and constitute an extremely small portion of all advertisements on Plaintiff's websites.[8] For this reason, and as discussed below, the Attorney General's actions are narrowly tailored, and the postings on Plaintiff's websites for transactions other than prostitution are not the subject of the investigation, nor are they chilled or threatened.

---

[7] "[I]t is now established that even obscene material may not be lawfully seized without a prior judicial adversary proceeding on the issue of obscenity, at which both sides have an opportunity to be heard." Drive In Theatres, 435 F. 2d at 230.

**D. The Commerce Clause.**

Plaintiff's Commerce Clause argument is also based entirely on Plaintiff's raising the spectre of having to completely shut down its South Carolina websites in order to avoid prosecution for advertisements being posted there, which most certainly has never been advocated or sought by the Attorney General, and does not have to occur. As discussed below, the record in this case clearly establishes Plaintiff can continue its South Carolina websites while easily avoiding prosecution.

Plaintiff erroneously contends its only choices are to shut down its South Carolina sites or face prosecution. Contrary to this contention, however, there is a readily available and positive alternative to those choices. Rather than either shutting down the South Carolina websites or being prosecuted, Plaintiff can simply reasonably monitor the postings to its "adult services" category.

Exhibit D to the Complaint outlines some measures Plaintiff purportedly undertook after the November 2008 agreement. After the Attorney General indicated those measures were simply insufficient as evidenced by information received from law enforcement regarding the continued use of Plaintiff's websites to facilitate prostitution in South Carolina, Plaintiff announced it was

[8]While the number of advertisements at issue is minuscule in relation to Plaintiff's overall business, the impact on South Carolina is much greater. State resources must be used to police and punish the illegal activity taking place in South Carolina as a result of the advertisements posted on Plaintiff's website.

replacing the "erotic services" category with an "adult services" category, and instituting employee review of each advertisement in that category. After Plaintiff's announcement, the Attorney General publicly stated the criminal investigation would continue, but before facing prosecution, Plaintiff would have a reasonable time to put these measures in place and show its intention to filter illegal advertisements was serious. *See* Complaint, Exhibit L.

The point of this discussion is not to describe all steps Plaintiff can take to avoid prosecution. At this time, an investigation is underway, and there has been no decision regarding prosecution of Plaintiff or its management after this action is resolved. Plaintiff has not cited any human or technological limits to its ability to detect most unlawful postings; instead resorting to conclusory and unsupported statements.[9]

Plaintiff is being investigated for knowingly aiding and abetting prostitution, not negligence. The Defendants are not demanding perfect monitoring, only serious efforts by Plaintiff to eliminate advertisements it concedes are illegal. If Plaintiff's avowed intent to implement measures designed to discourage, monitor and detect "adult services" postings related to unlawful activity is indeed serious, the likelihood it can maintain its websites and avoid prosecution is greatly enhanced. In short, Plaintiff does not need to be rescued by the courts; rather, Plaintiff itself controls the solution.

## III. CONCLUSION

This Court should abstain from considering the issues raised in the Complaint because there is an ongoing state criminal investigation in which the issues can be resolved as necessary by a South

[9] Plaintiff states it has forty million ads monthly, but stated in the Complaint there are only approximately forty ads in the South Carolina adult services category. (Complaint, ¶44). Given the scope of Plaintiff's operation, the limited number of advertisements at issue can be reviewed quickly, or other measures can be adopted to ensure an adequate level of monitoring within reasonable means.

Carolina state court. If the Court determines federal intervention is appropriate at this time, however, the case should be dismissed on the merits.

The primary issue before the Court in this case is a narrow one - does enforcement of South Carolina's aiding and abetting prostitution law as to Plaintiff violate §230 of the CDA, the First Amendment or the Commerce Clause. Ruling for Defendants will merely allow enforcement of that law. Ruling for Plaintiff, however, will contravene the intent of Congress in §230, and broadly immunize internet service providers from criminal responsibility for knowingly violating any state criminal law, even one that is consistent with §230. Such a ruling will also extend First Amendment and Commerce Clause protection to speech and activities excluded from constitutional protection by long standing precedent.

Based on the foregoing, Defendants submit the Complaint fails to state a cause of action for which relief can be granted under any legal theory, and this action should be dismissed pursuant to Rule 12(b)(6), FRCP.

Respectfully submitted,

HENRY D. McMASTER
Attorney General
Federal Bar No. 2887

ROBERT D. COOK
Assistant Deputy Attorney General
Federal Bar No. 285
Email: AGRCOOK@SCAG.GOV

/s/ J. Emory Smith, Jr.
J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Federal Bar No. 3908
Email: AGESMITH@SCAG.GOV

(SIGNATURE BLOCK CONTINUED ON NEXT PAGE)

DEBORAH R.J. SHUPE
Assistant Attorney General
Federal Bar No. 3835
Email: DSHUPE@SCAG.GOV

Post Office Box 11549
Columbia, South Carolina 29211
Phone: (803) 734-3680
Fax: (803) 734-3677

ATTORNEYS FOR DEFENDANTS

September 11, 2009